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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States (ACUS) adopted two recommendations at its Fifty-First Plenary Session. The recommendations concern the application and modification of Exemption 8 of the Freedom of Information Act, and procedures governing debarment and suspension from federal programs.

FOR FURTHER INFORMATION CONTACT: Nancy G. Miller, 202–254–7020.

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States was established by the Administrative Conference Act, 5 U.S.C. 591–596. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by federal agencies in carrying out administrative programs, and makes recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). At its Fifty-First Plenary Session, held January 19, 1995, the Assembly of the Administrative Conference of the United States adopted two recommendations.

Recommendation 95–1, ''Application and Modification of Exemption 8 of the Freedom of Information Act,'' suggests some changes in the scope of coverage of that exemption. Exemption 8 protects from disclosure certain documents relating to examination and supervision of banks by federal agencies. The Recommendation proposes that Exemption 8 be retained for examination reports of open banks, and modified for examination reports for closed banks that have failed. Operating and condition reports should be disclosed insofar as they contain or are based on publicly available information. The Conference also makes several suggestions to bank regulatory agencies on their administration of Exemption 8.

Recommendation 95–2, ''Debarment and Suspension from Federal Programs,'' addresses issues relating to debarments and suspensions from federal procurement and nonprocurement programs. It recommends that debarment from procurement programs have the effect of debarment from nonprocurement programs, and vice versa. It recommends that independent factfinders preside over hearings on disputed material facts. It makes suggestions on improvements in the procedures governing debarments and suspensions, and it recommends that Congress refrain from legislating mandatory debarments.

The full texts of the recommendation are set out in the Appendix below. The recommendations will be transmitted to the affected agencies and to appropriate committees of the United States Congress. The Administrative Conference has advisory powers only, and the decision on whether to implement the recommendations must be made by the affected agencies or by Congress.

Recommendations and statements of the Administrative Conference are published in full text in the **Federal Register**. In past years Conference recommendations and statements of continuing interest were also published in full text in the Code of Federal Regulations (1 CFR Parts 305 and 310). Budget constraints have required a suspension of this practice in 1994. However, a complete listing of past recommendations and statements is published in the Code of Federal Regulations. Copies of all past Conference recommendations and statements, and the research reports on which they are based, may be obtained from the Office of the Chairman of the Administrative Conference. Requests for single copies of such documents will be filled without charge to the extent that supplies on hand permit (see 1 CFR 304.2).

The transcript of the Plenary Session is available for public inspection at the Conference's offices at Suite 500, 2120 L Street, NW, Washington, DC.

Dated: March 7, 1995.

Jeffrey S. Lubbers,

Research Director.

Appendix—Recommendations of the Administrative Conference of the United States

The following recommendations were adopted by the Assembly of the Administrative Conference on Thursday, January 19, 1995.

Recommendation 95–1, Application and Modification of Exemption 8 of The Freedom of Information Act

Background

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, generally mandates public access to records in the possession or control of federal agencies, whether the records are generated by the agency or obtained by it from other sources. The Act contains nine exemptions, each of which authorizes but does not require the agency to protect from disclosure certain types of information. Exemption 8 permits agencies responsible for the regulation or supervision of financial institutions to protect from disclosure matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the agency.

Exemption 8 provides an unusual level of protection to banks and bank regulatory agencies.[1] Except for Exemption 9, dealing with geological and geophysical information, no other FOIA exemption is industry- or agency-specific. In light of the change in the regulatory environment of financial institutions since the passage of the FOIA in 1966, the Conference has reviewed whether this broad exemption continues to be justified. The upheaval faced by financial institutions in the last decade and the number of such institutions that have failed makes availability of information relating to the regulation of that segment of the economy of particular interest. A substantial amount of taxpayer money has been spent to alleviate problems relating to financial institutions.

Exemption 8 covers a wide range of documents, primarily operating reports, condition reports, and examination reports of financial institutions. Operating and condition reports are largely public financial statements submitted by the bank to the agency, although they also may include some nonpublic information. Examination reports are the written statements prepared by the

[1] The use of the term ''bank'' herein is intended to refer to all financial institutions whose information is subject to Exemption 8. Likewise, the term ''bank regulatory agency'' refers to any agency responsible for the regulation or supervision of financial institutions.

agency's examiners evaluating the bank's operations and practices, but they are not audit reports. Examination reports include, among other things, information about an institution's portfolio of loans, the strength of its management, and areas that may need corrective action to improve its safety, soundness, and compliance with law. While bank regulatory agencies encourage examiners to make their reports candid, careful, and complete, the reports often include preliminary analysis and commentary. The examination report (known in some agencies as the ''open'' portion) is made available to the bank, on the condition that it not be disclosed outside the bank. The agencies retain the supporting information for the report (which in some agencies is known as the ''closed'' portion). Most agencies also include in the examination report and disclose to the bank what is known as a CAMEL rating: a composite summary in numerical form of key components of the examination—Capital, Asset quality, Management, Earnings, and Liquidity. There are also ratings for each factor in the closed portion.

Justification for Scope of Exemption 8

The Administrative Conference has always endorsed the FOIA concept of disclosure of government records[2] while recognizing the need to balance competing concerns.[3] Thus, it concludes that, while the basic protection of confidential and sensitive data relating to open banks should continue, where documents or information in agencies' possession are already public or relate to an institution no longer operating, the public interest in disclosure outweighs the potential harm from such disclosure.

Exemption 8's protection of operating, condition and examination reports is generally seen as serving three primary purposes: (1) It protects banks—including both the examined bank and those that have relationships with it—from substantial harm that might be caused by disclosure of information and opinion about their condition; (2) It facilitates the free exchange of information between bank personnel and examiners and encourages bank examiners to be candid, and as necessary, immediately responsive, in their assessments of a bank's financial position and operation; and (3) It protects the privacy of bank customers (e.g., depositors and borrowers).

Bank regulators and the institutions they regulate and/or supervise have generally asserted the need to protect both the candor of examination reports and the nonadversarial nature of the relationship between examiners and financial institution officials. In particular, they have expressed concern that disclosure of sensitive adverse information—especially preliminary data, information, and conclusions—could reduce the candor of the examiners' comments and analysis, and inhibit bank officials from offering open access to their records and from being frank and open in their discussions with the examiners. Examination reports, they point out, are intended to draw the attention of bank management to actual and potential problems as quickly as possible.

The exemption is also aimed at protecting the stability of financial institutions by preventing the inappropriate disclosure of information relating to the soundness of the institution, as reflected in examination reports and in operating and condition reports. The expressed concern is to avoid ''runs on the bank,'' as well as other adverse impacts—e.g., short-term liquidity problems, volatility in cost of funds, reduced access to credit or to depositors. Nondisclosure is further justified on grounds that harmful overreactions based on incomplete data are likely to outweigh any public benefits. Financial institutions are also by their nature interrelated, in the sense that an adverse impact on one may have broad and possibly severe adverse implications for others. Moreover, the need for disclosure is diminished insofar as the public already receives, as a result of various banking and securities law requirements, a substantial amount of detailed, comparable information about banks.

Finally, there is a critical interest in protecting the privacy of those doing business with a financial institution. Examiners evaluate samples of loans. Information that might permit identification of the borrowers and other customers, as well as information about their financial situation and soundness, may appear in examination reports. There seems little doubt that information that might identify customers generally should be exempt from disclosure.[4]

Proper Scope of Exemption 8

Because of these considerations, the Conference believes that Exemption 8's provisions should be retained for ''matters that are contained in or related to examination * * * reports'' pertaining to open banks. The continued protection of examination reports of open institutions seems appropriate under the current regulatory regime.

Congress should, however, limit the exemption's coverage with respect to information in operating and condition reports that is publicly available. Almost all of the information contained in operating and condition reports (i.e., quarterly statements of income and expenses, assets and liabilities) is currently in the public domain. As a result, bank regulatory agencies generally do release such information even though it may literally fit within Exemption 8. There is, therefore, no reason to retain this portion of the exemption insofar as it permits nondisclosure of publicly available data.

The more difficult question is whether the protection of other information covered by Exemption 8 continues to be warranted. Although the Conference concludes that examination reports with respect to open institutions should remain protected, it believes that examination reports (including all CAMEL ratings) of closed institutions that have failed should not be exempt from disclosure. (Closed institutions that did not fail would be treated like open institutions for this purpose.[5])

The deposit insurance program gives the public (and the taxpayers) a particular interest in knowing what caused a bank to fail and whether regulatory oversight was adequate or effective.[6] Release of examination report information is unlikely to cause any harm to the institution itself once it is closed; nor is there any ongoing relationship between the examiner and the bank officials that would be jeopardized by disclosure. The examiners' concern about protecting candor is sharply reduced for banks that are closed.[7] Further, the disclosure of such information pertaining to closed banks would, of course, continue to be subject to other FOIA exemptions.[8]

Nonetheless, to further ensure that disclosure will not cause undue harm, the Conference recommends that certain limitations be placed on disclosure of examination reports of closed banks that have failed. Disclosure concerning a failed bank that could reasonably be expected to impair the solvency of an open bank or efforts to sell the failed institution or its assets should be delayed. Similarly, disclosure should be delayed where it could reasonably be expected to interfere with an ongoing civil or criminal investigation. Information relating to specific loans or other information that would identify customers could be redacted. Moreover, in cases where either the Federal Deposit Insurance Corporation or the Resolution Trust Corporation is involved in responding to the bank's failure, other bank regulatory agencies should consult with them before releasing examination reports.

Separately, the Conference also proposes that Congress consider whether Exemption 8

[2] See ACUS Recommendation 71–2, ''Principles and Guidelines for Implementation of the Freedom of Information Act.'' See also Presidential Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993) (Policy statement on the use of the FOIA encouraging agencies to disclose agency records in the absence of any clear harm); Attorney General's Memorandum for Heads of Departments and Agencies, The Freedom of Information Act (Oct. 4, 1993).

[3] See ACUS Recommendation 82–1, ''Exemption (b)(4) of the Freedom of Information Act,'' Recommendation 83–4, ''The Use of the Freedom of Information Act for Discovery Purposes.''

[4] Protection of a customer's privacy interest may require redaction of more than a customer's name; other characteristics of the loan might reveal customer identifications.

[5] The Conference does not seek to define when a closed bank would be deemed to have failed. As discussed below, among the bases for recommending that information about closed failed banks be available under FOIA are the role of government oversight and impacts on taxpayers.

[6] While Congress has mandated reports by the agency's Inspector General for certain bank failures after July 1, 1993 (see Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C.§ 1831o(k)), disclosure of the underlying data, if requested, may provide a useful validation or check on such reports.

[7] Despite recent history, the vast majority of all financial institutions do not fail. This recommendation, therefore, addresses only the disclosure on request of examination reports of a narrow group of banks where the justification for release of the data is especially compelling.

[8] Among the potentially relevant exemptions are Exemptions 4 (confidential commercial or financial information), 5 (agency predecisional documents), 6 (personal privacy), and 7 (investigative reports).

should continue to apply to situations where examination or other reports of financial institutions are prepared by agencies having no authority to regulate or otherwise supervise those institutions.[9] Especially where the financial institutions do not accept deposits from the public and there is no applicable deposit insurance, Congress should review whether the policies underlying the Exemption apply.

If Congress believes that additional information relating to financial institutions would improve accountability and oversight or provide for a better-informed marketplace, the Conference recommends that Congress consider using the approach taken in the Community Reinvestment Act, where specific, focused, published reports have been required.[10]

Administration of Exemption 8

There are a number of actions bank regulatory agencies can take under their current authority to improve implementation of Exemption 8. Several bank regulatory agencies have already implemented many of them, and the Conference recommends their consideration by all. As a first step, agencies that regulate or supervise financial institutions should ensure that information that is otherwise publicly available is not treated as exempt under the FOIA. For example, as noted, operating and condition reports contain information that appears largely to be publicly available from other sources. To the extent that this and other information currently withheld under Exemption 8 is otherwise available and can be separated from sensitive data, agencies should release such information. Agencies should also continue to review their data collection forms and information-gathering documents and design them so that confidential information is collected separately and can be easily segregated from information that could be disclosed.

Several bank regulatory agencies now participate in an interagency FOIA group. The Conference lauds this effort, and encourages all bank regulatory agencies to coordinate their application of the exemption and its scope, in order to ensure that similar documents are treated similarly. In doing so, agencies should keep in mind the FOIA's intent to allow the public to know what agencies are doing to the greatest extent possible. Agencies generally should presume, for example, that if one agency releases a particular type of document, such documents should be released by all other agencies if requested. Agencies also should avoid routinely exempting documents that are ''related to'' examination reports without carefully evaluating whether the information could be disclosed. Even though an examination report itself may be nondisclosable, not all portions of all documents related to it are necessarily also nondisclosable.

Bank regulatory agencies should also consider using the ombudsmen recently mandated by statute[11] to inquire into citizen concerns about handling FOIA requests and to recommend solutions or possible systemic improvements. The Conference has previously stated that use of alternative means of dispute resolution should be explored in resolving FOIA disputes[12]

Agencies generally have the discretion to release requested information even if it is otherwise exempt under the FOIA. Pending Congressional action on the recommendations to modify Exemption 8, the bank regulatory agencies should implement the recommendations independently and, in any case, they should experiment with the release of examination reports for large failed banks. This would provide information to the public about the banks for which the largest amounts of money (and potentially, public funds) are at stake, and would provide an opportunity for determining whether such release has any significant untoward effects.

Recommendation

I. As applied to open financial institutions and closed financial institutions that have not failed, the provisions of Exemption 8 of the Freedom of Information Act should be retained for ''matters that are contained in or related to examination * * * reports.'' The Conference concludes that bank regulatory agencies should continue to have discretion to withhold such examination reports, because, among other reasons, (a) disclosure of material relating to supervision and regulation of open financial institutions might have an adverse impact on the supervisory and regulatory process and on the banks themselves,[13] (b) such disclosure also might have an adverse economic impact on other banks, due to the unique interrelationship of such institutions, and (c) a substantial amount of related information is already otherwise available.

II. A. In order to ensure that information about banks is not unreasonably withheld, Congress should limit the exception to disclosure in Exemption 8 as follows:

1. As applied to closed institutions that have failed, examination reports and CAMEL ratings should not be exempt from disclosure, except that disclosure should be delayed where it could reasonably be expected to (a) impair the solvency of an open bank or an agency's efforts to sell the closed bank or its assets, or (b) interfere with an ongoing civil or criminal investigation. Records identifying specific loans or customers could be redacted,[14] and prior consultation with other agencies with jurisdiction over such a closed bank should be required.

2. As applied to all financial institutions, operating and condition reports should not be exempt from disclosure insofar as they contain or are based on publicly-available information.

B. Congress should also consider whether Exemption 8 should continue to apply to examination or other reports of financial institutions prepared by agencies having no authority to regulate or otherwise supervise those institutions, especially where the financial institutions do not accept deposits from the public.

III. To the extent that Congress determines that additional information relating to the regulation or examination of financial institutions should be publicly available to enhance accountability and oversight, it should provide for preparation of special public reports and analyses, or for other mechanisms specifically designed to provide the necessary information to the public on a systematic basis.[15]

IV. Agencies with supervisory or regulatory responsibilities relating to financial institutions should continue to review ways to improve their administration of the Freedom of Information Act.

A. Bank regulatory agencies should implement the following practices:

1. Information subject to Exemption 8 should be withheld only insofar as necessary to protect the efficacy of the examination process and the privacy of sensitive data and to avoid adverse economic impacts on other banks. Agencies should not withhold information on the basis that it is ''related to'' operating, condition or examination reports unless they determine that nondisclosure is properly justified.

2. Information that is already publicly available should not be treated as exempt from disclosure. For example, agencies should continue, in response to FOIA requests, to release operating and condition information submitted by financial institutions that is publicly available.

3. To facilitate the disclosure of releasable information, agencies should, to the extent feasible, design data-collection forms or other information-gathering mechanisms in order to separate disclosable and nondisclosable information.

4. Agencies authorized to rely on Exemption 8 should continue to develop a coordinated approach for releasing

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[9] See, e.g., Public Citizen v. Farm Credit Administration, 938 F.2d 290 (D.C. Cir. 1991) (Reports of FCA regarding the National Consumer Co-op Bank covered by Exemption 8).

[10] The Community Reinvestment Act, 12 U.S.C. § 2906, requires reports concerning credit made available by banks in low and moderate income areas. See also the Federal Deposit Insurance Corporation Improvement Act of 1991, which requires reports by the agency's Inspector General for each bank failure after July 1, 1993.

[11] The Office of the Comptroller of the Currency has an ombudsman, whose current responsibilities include involvement in banks' challenges to their CAMEL ratings. Recently enacted Pub. L. No. 103–325 requires each federal banking agency to appoint an ombudsman to deal with complaints from the public about regulatory activities.

[12] Administrative Conference Statement 12, 1 CFR 310.12 (1993). It has also recommended the use of ombudsmen more generally in federal agencies. Administrative Conference Recommendation 90–2, ''The Ombudsman in Federal Agencies,'' 1 CFR 305.90–2 (1993).

[13] The use of the term ''bank'' herein is intended to refer to all financial institutions whose information is subject to Exemption 8. Likewise, the term ''bank regulatory agency'' refers to any agency responsible for the regulation or supervision of financial institutions.

[14] This recommendation does not seek to alter the applicability of other FOIA exemptions or of notice requirements such as those set out in Executive Order 12600 (relating to predisclosure notification for confidential commercial information).

[15] For an illustration of such a report, see the Community Reinvestment Act, 12 U.S.C. § 2906 (reporting on supply of credit by banks in low and moderate income areas).

information, so that the public receives uniform treatment for similar data or types of documents.

5. Agencies should consider using their ombudsmen to inquire into citizen concerns about handling of FOIA requests and to recommend solutions or possible systemic improvements.[16]

B. In light of their discretion to release even otherwise exempt information in response to requests under the FOIA, bank regulatory agencies should implement the recommendations set forth in Part II(A). In any case, agencies should, on an experimental basis, immediately make the disclosures recommended therein with respect to large failed financial institutions.

Recommendation 95–2, Debarment and Suspension from Federal Programs

Introduction

The federal government is very big business in its purchases of products and services and in its provision of grants, loans, subsidies, and other types of economic assistance. Many private companies—small, medium, and large—rely to a significant degree on their business with the government for economic survival. In this recommendation, the Administrative Conference of the United States addresses several significant issues that arise when federal agencies act to protect the public fisc by suspending or debarring individuals and companies who allegedly are not responsible enough to continue to do business with the government.

The Administrative Conference of the United States has considered the topic of debarment and suspension from federal programs several times in the last 35 years. The 1961–62 temporary Administrative Conference issued a series of influential recommendations on the procedural structure of debarment and suspension of federal contractors. A 1975 study done for the Conference found that those recommendations remained sound. Since then, there has been substantial activity in the debarment and suspension area, as the Federal Acquisition Regulation (FAR) and other regulatory programs have been promulgated to authorize such actions both in the procurement and nonprocurement arenas, and Congress has authorized debarment and suspensions in a variety of contexts.

The Conference's recent study focused on the regulatory programs involving procurement debarment coordinated by the Federal Acquisition Regulation Council (FAR Council)[1] and promulgated in the FAR,[2] and a comparable (but not identical) effort involving nonprocurement debarment coordinated separately by OMB (known as the ''Common Rule'').[3] The two debarment and suspension programs have similar structures, but they are not identical, and not completely complementary.

Debarment refers to an action to preclude individuals and entities from receiving future contracts or other benefits such as loans or grants for a designated period of time. A suspension is a similar action on a temporary basis. They are intended to ensure that government ''does business,'' in both its contracts and its nonprocurement assistance programs, only with individuals and entities that are ''presently responsible.''

The Department of Defense alone debarred or suspended 1,157 persons and businesses in 1994. Across the federal government, almost 6,000 entities were debarred or suspended the same year.

A. Procurement

The regulations set forth in the FAR provide that each agency should promulgate its own regulations consistent with the FAR provisions. The FAR provides that an agency may suspend a contractor on an immediate, temporary basis prior to a hearing, based on ''adequate evidence'' of a variety of actions relating to a lack of contractor integrity. A proposed debarment, for which there is no minimum evidentiary threshold set out in the FAR, also has the effect of immediately precluding the award of additional federal contracts. Contractors have the opportunity to present information and argument in opposition to a suspension or proposed debarment. In cases where there is a disputed issue of material fact, a contractor is entitled to an informal factfinding hearing where the contractor may appear with counsel, submit documentary evidence, and present and confront witnesses. The regulations do not specify the type of hearing officer. The regulations do contain a list of mitigating factors the debarring official (who is usually also the suspending official) should consider in deciding whether to debar or suspend. Most debarments involve contractors that have been indicted or convicted; relatively few involve disputed issues of material fact that would warrant a hearing.[4]

Contractor suspensions and debarments have government-wide effect; i.e., no executive branch agency may enter into a contract with a debarred or suspended contractor. The General Services Administration administers a list of debarred and suspended contractors.

B. Nonprocurement

The nonprocurement debarment and suspension process is based on Executive Order 12549, issued in 1986. OMB led an effort for uniform regulations (the Common Rule), and at least 36 agencies have issued such a rule. The regulatory framework differs slightly from the procurement debarment system. The procedures are basically similar, with suspended persons entitled to appear in person or submit written argument and information after the suspension is effective, and a further informal hearing available in cases with disputed issues of material fact. Unlike in the procurement context, however, a proposed debarment does not have immediate effect. Nor do the nonprocurement regulations contain a list of factors the debarring official should consider in connection with the decision whether to debar or suspend.

As in the procurement context, nonprocurement debarments and suspensions have executive branch-wide effect and the GSA publishes a list of those debarred or suspended. However, those debarred or suspended under one (e.g., the nonprocurement) system are not now debarred from the other; i.e., there is no reciprocal effect.

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Debarments and suspensions under both regulatory programs generally may not exceed 3 years. They may be terminated on a showing that, among other things, there has been a bona fide change in ownership or management, or that the causes on which the debarment was based have been eliminated.

Discussion

Although the nonprocurement and procurement debarment programs appear generally to be functioning fairly well, the Conference does recommend some changes to make the process more efficient and more fair.

A. Reciprocal Effect

As noted, the procurement and nonprocurement systems, while each having government-wide effect, do not have reciprocal effect. Legislation[5] and an executive order[6] have mandated that this problem be resolved, and the Conference underscores the importance of making the appropriate regulatory modifications promptly to ensure that debarment or suspension under one system leads to debarment or suspension under both. The Conference also believes that the existing provisions allowing agency heads to waive the applicability of a government-wide debarment or suspension for their agency should be retained.[7]

B. Debarring Officials and Hearing Officers

Neither regulatory framework specifies criteria for appointing the debarring official. Some agencies have written specifications identifying the type of official who is to perform this function, as well as the official who is to serve as a hearing officer in the relatively few cases where informal hearings on disputed issues of fact are held. However, there is no uniformity among the agencies that have established these criteria. For example, at the Department of Housing and Urban Development, where hearings are relatively frequent, administrative law judges

[16] See Pub. L. No. 103–325, which requires each federal banking agency to appoint an ombudsman. See Administrative Conference Recommendation 90–2, ''The Ombudsman in Federal Agencies,'' 1 CFR 305.90–2 (1993).

[1] The FAR Council includes representatives of the Office of Federal Procurement Policy in OMB, the General Services Administration, NASA, and the Department of Defense.

[2] 48 CFR § 9.400 et seq.

[3] 53 Fed. Reg. 19,204 (1988).

[4] For example, 96 percent of the Air Force's debarments and suspensions are based on indictments and convictions. Neither the Army, Air Force, Defense Logistics Agency, nor the Navy has had fact-based hearings in any debarment or suspension cases in the last 5 years.

[5] The Federal Acquisition Streamlining Act, Pub. L. No. 103–355 (1994).

[6] Executive Order 12689, issued in 1989.

[7] Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406–1(c), 9.407–1(d), and in the Common Rule at X.215.

(ALJs) or board of contract appeals (BCA) judges serve in effect as debarring officials, while also presiding over the hearings. At the Department of the Air Force, the debarring official is the Assistant General Counsel for Contractor Responsibility, and a military trial judge presides over any factfinding proceedings. The Environmental Protection Agency's debarring official is the director of its Office of Grants and Debarment, but the agency uses hearing officers who do not have the institutional independence of an ALJ, BCA judge, or military judge. Few agencies expressly require either the debarring official or the hearing officer to have any specific level of institutional independence.

The informal nature of the adjudication, as well as the process for a prehearing suspension, have been consistently upheld by the courts as providing due process. Courts have occasionally discussed the need to ensure some measure of independence on the part of adjudicators.[8] Neither the FAR nor the Common Rule explicitly addresses the issue. Given the informal character of debarment and suspension determinations, as well as the ''business'' protection basis for such decisions, the strict separation of functions and total avoidance of ex parte contacts that would apply in more formal contexts may not be needed. However, it is important that the debarring official be sufficiently independent to protect due process. It is, for example, good practice that the debarring official not be supervised by nor directly supervise the investigators or advocates who are developing the cases. It is also good practice for debarring officials generally to ensure that all information that serves as the basis for decision appears in the administrative record, and that it is made available to the respondent in contested cases.

When there is a hearing to resolve disputed issues of material fact in a suspension or debarment case, a greater degree of independence ought to be required on the part of the hearing officer. The Administrative Conference has recently taken the position that cases involving ''imposition of sanctions with substantial economic effect'' should be heard by administrative law judges.[9] Debarments and suspensions clearly can have substantial economic effect. Depending on the type of entity and the nature of its business, a debarment from federal contracts or other benefits may bankrupt a company. Therefore, while a full APA formal hearing is not constitutionally required in debarment and suspension cases, even where there are disputed issues of fact, use of a truly independent hearing officer is consistent with notions, and appearances, of fairness. In some statutory debarment programs, Congress has required that post-debarment hearings be presided over by ALJs.[10] ALJs clearly have the requisite independence. Administrative judges from boards of contract appeals and military judges have similar independence. They are experienced in providing hearings that ensure that the respondent has the proper opportunity to present a case. Using only such independent judges for factfinding hearings would also ensure uniformity among agencies; since a debarment has government-wide effect, the nature of a fact-finding hearing should not depend on the particular agency taking the action. The Conference therefore recommends that, where there are disputed issues of material fact in debarment or suspension cases, the agency assign an ALJ, BCA judge, or military judge to preside over the hearing. If an agency wishes to use some other hearing officer, it should ensure that such officer is guaranteed independence comparable to that of an ALJ.[11] Agencies should also provide in their rules whether the judge would issue (a) findings of fact that would be certified to the debarring official; (b) a recommended decision to the debarring official; or (c) an initial decision, subject to any appropriate further appeal within the agency.[12]

C. The FAR and Common Rule

As discussed above, the two sets of procedures, for procurement and for nonprocurement debarment and suspension, are not identical. Some of the variations relate to the differing natures of the programs they address. On other issues, uniformity might serve to eliminate confusion, especially in light of the government-wide effect and (hopefully soon-to-be) reciprocal impact. At a minimum, there are several issues that the Conference recommends be addressed in each set of rules.

Both nonprocurement and procurement debarments and suspensions are discretionary. The procurement regulations include a list of mitigating factors the debarring official should consider in determining whether to debar or suspend.[13] No such list exists in the nonprocurement context, and neither program has a list of aggravating factors. The Conference recommends that a list of mitigating and aggravating factors be included in the regulations for both programs. These lists should be considered by debarring officials both in determining whether to impose a debarment or suspension, and in determining the period of debarment.[14] The Conference takes no position on whether any such list should represent an exclusive list of factors to be considered, but does recommend that each agency make clear its intention with respect to exclusivity. The Conference also notes that both aggravating and mitigating circumstances should focus on issues relating to the respondent's ''present responsibility'' to avoid any appearance that the debarment is intended as punishment.

As noted, each type of debarment is effective across the executive branch. There will thus be cases where a particular entity does business with multiple agencies. The Conference recommends that a procedure be developed by which agencies can efficiently and routinely coordinate with each other and determine which agency will serve as the lead agency on behalf of the government in taking debarment and/or suspension action. This would avoid multiple actions with inconsistent results. It may also ensure that the agency with the greatest interest will handle the case. The Conference is aware that agencies considering actions relating to the same respondent do confer informally in many cases, but believes that a more uniform, regularized process for agencies to determine a lead agency in particular cases would be preferable.

As also noted, suspensions become effective immediately. The suspended respondent may, after the fact, submit written comment and information to the debarring official opposing the continuation of the suspension. In some cases, the lack of advance notice is necessary to allow an agency to protect the integrity of its contracting or nonprocurement program. In other cases, however, it may be appropriate to provide advance notice to the potential respondent that a suspension or proposed debarment may be forthcoming. In fact, some agencies do send what are in essence ''show cause'' letters in certain situations. In cases where the interests of the government would not be substantially adversely affected by providing advance notice of a suspension of proposed debarment, the Conference encourages agencies to provide such notice.

Given that debarments and suspensions have a government-wide effect and may soon also apply to both procurement and nonprocurement programs, it is especially important that respondents be given notice at the earliest opportunity of these potential impacts.

Suspensions require a finding of ''adequate evidence'' as a threshold for their issuance. Proposed debarments, which in the procurement context have a similar preclusive effect, have no such threshold. (An ultimate decision to debar must be based on the preponderance of evidence, however.) Given their immediate effect, a minimum evidentiary threshold for procurement proposals to debar would also be appropriate. The Conference recommends that proposals to debar in the procurement context require ''adequate evidence of cause to debar.''

The Administrative Conference also recommends that all agencies within the ''executive branch'' (broadly construed to include ''independent'' agencies) should implement the ''Common Rule'' and those portions of the FAR that address suspension and debarment.

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[8] In Girard v. Klopfenstein, 930 F.2d 738 (9th Cir. 1991), the court suggested the need for a separation of the prosecutorial and decisionmaking functions in a debarment case, but did not explicitly decide the issue.

[9] See Recommendation 92–7, ''The Federal Administrative Judiciary,'' at ¶ A(1)(c).

[10] See 42 U.S.C. § 1320a-7(exclusion of health care providers from Medicare program participation).

[11] See 5 U.S.C. § 554(d)(2).

[12] Regarding the need to clearly set forth the appeals procedure, see Darby v. Cisneros, 113 S.Ct. 2539 (1993)(in absence of agency regulations governing agency appeal, respondents could proceed directly to court).

[13] The procurement debarment rule indicates that the debarring official ''should consider'' the mitigating factors in determining whether to debar. The suspension rule provides that the suspending official ''may, but is not required to consider'' mitigating factors in determining whether to suspend. The Conference recommends that the ''should consider'' language be used in both debarment and suspension cases.

[14] The Administrative Conference has recommended standards for mitigating statutory money penalty amounts imposed administratively. See Recommendation 79–3, ''Agency Assessment and Mitigation of Civil Money Penalties.''

D. Statutory Debarments

The procurement and nonprocurement debarment and suspension programs are based in regulation and/or executive order. There are also many statutorily-based debarment schemes, some of which also involve procurement and nonprocurement programs. In many of these statutory programs, Congress has restricted agencies' discretion whether to debar, or to determine the length of a debarment.[15] Congress has increasingly opted to require agencies to debar or suspend in particular situations. Debarment and suspension are not intended to be punitive remedies, but rather are premised on the need to protect the integrity of government programs. The Conference believes that Congress should ordinarily allow agencies to retain the discretion to determine (1) whether debarments or suspensions are appropriate in individual cases, and (2) the appropriate length of such debarments. Moreover, Congress should review existing statutory schemes that mandate debarment and/or particular terms of debarment, and determine whether they should be continued. The primary basis for recommending that agency discretion not be limited with respect to most debarment and suspension determinations is the need to retain flexibility to meet the needs of the government and the public. The Conference believes that agency officials generally would be in a better position than Congress to determine appropriate remedial sanctions in individual cases that serve both to protect the fisc and meet program needs.[16]

The co-existence of the regulatory debarment programs that are the focus of this recommendation with a broad variety of statutory debarment programs creates a number of issues that relate to the interactions between them. The Conference may in the future study these issues, which include conflicts that arise from inconsistent procedural requirements and questions about whether all statutory programs are intended to have government-wide effect.

Recommendation

I. Entities coordinating the Federal Acquisition Regulation (FAR) and the Common Rule for nonprocurement debarment, and individual agencies in their procurement and nonprocurement debarment and suspension regulations, should promptly ensure that the applicable regulations provide that suspensions or debarments from either federal procurement activities or federal nonprocurement activities have the effect of suspension or debarment from both, subject to waiver and exception procedures.[17]

II. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should ensure that:

A. cases involving disputed issues of material fact are referred to administrative law judges, military judges, administrative judges of boards of contract appeals, or other hearing officers who are guaranteed similar levels of independence [18] for hearing and for preparation of (1) findings of fact certified to the debarring official; (2) a recommended decision to the debarring official; or (3) an initial decision, subject to any appropriate appeal within the agency.

B. debarring officials in each agency should:

1. Be senior agency officials;

2. Be guaranteed sufficient independence to provide due process; and

3. In cases where the agency action is disputed, ensure that any information on which a decision to debar or suspend is based appears in the record of the decision.

III. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should provide that each regulatory scheme for suspension and debarment includes:

A. A list of mitigating and aggravating factors that an agency should consider in determining (1) whether to debar or suspend and (2) the term for any debarment;

B. A process for determining a single agency to act as the lead agency on behalf of the government in pursuing and handling a case against a person or entity that has transactions with multiple agencies;

C. (With respect to procurement debarment only) a minimum evidentiary threshold of at least ''adequate evidence of a cause to debar'' to issue a notice of proposed debarment;

D. A requirement that all respondents be given notice of the potential government-wide impact of a suspension or debarment, as well as the applicability of any such action to both procurement and nonprocurement programs; and

E. Encouragement for the use of ''show cause'' letters in appropriate cases.

IV. All federal agencies in the executive branch (broadly construed to include ''independent'' agencies) should implement the ''Common rule'' and FAR rules on suspension and debarment.

V. Congress should ordinarily refrain from limiting agencies— discretion by mandating suspensions, debarments, or fixed periods of suspension or debarment. Congress should also review existing laws that mandate suspensions, debarments, and fixed periods, to determine whether to amend the provisions to permit agency discretion to make such determinations.

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[15] For example, DHHS is required to —exclude— from participation in the Medicare and Medicaid programs for 5 years any health care provider who is convicted of a crime related to the provision of services under those programs, or of patient abuse. 42 U.S.C. § 1320a-7(a).

[16] This recommendation should not be read to discourage Congress from providing guidelines for agencies to consider in exercising their discretion.

[17] Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406–1(c), 9.407–1(d), and in the Common Rule at X.215.

[18] See 5 U.S.C. § 554(d)(2).

DEPARTMENT OF AGRICULTURE

Forest Service

Inland Native Fish Strategy

ACTION: Proposal to Prepare Interim Direction for Native Inland Fish Habitat Management.

SUMMARY: The notice is hereby given that the Forest Service, in cooperation with the Bureau of Land Management and U.S. Fish and Wildlife Service, is gathering information in order to prepare an Environmental Assessment (EA) for a proposal to protect habitat and populations of native inland fish. The Forest Service is proposing to amend Regional Guides and Forest Plans to include interim direction in the form of riparian management objectives, standards and guidelines, and monitoring requirements. The interim direction will apply to the geographic area covered by the Eastside Ecosystem Management Strategy Environmental Impact Statement (EIS) and Upper Columbia River Basin EIS, except for anadromous fish habitat (which is now being managed under the interim PACFISH strategy, approved February 24, 1995).

The purpose and need for the proposed action is to preserve management options for inland aquatic resources by reducing the risk of loss of populations and reducing potential negative impacts to aquatic habitat of resident fishes until the signing of Records of Decision for both EISs. As a companion to the protection provided for anadromous fish by PACFISH, this Environmental Assessment is intended to provide the basis for establishing appropriate interim direction to protect habitat and populations of resident native fishes outside of anadromous fish habitat, including bull trout which has recently been determined to be warranted by the U.S. Fish and Wildlife Service (**Federal Register** Vol. 59, No. 111, June 10, 1994, pp. 30254–30255). Specifically this EA will address National Forest System lands on the Bitterroot, Boise, Caribou, Challis, Clearwater, Colville, Deerlodge, Deschutes, Flathead, Fremont, Helena, Humboldt, Kootenai, Lolo, Malheur, Ochoco, Panhandle, Payette, Salmon, Sawtooth, Wallowa-Whitman, and Winema National Forests in the Northern, Intermountain, and Pacific Northwest Regions.

The Forest Service also serves notice that the agency is seeking information and comments from Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action. This input will be used in preparing the Environmental Assessment.

Written comments should be sent to the agency within 30 days from the date of publication in the **Federal Register**.

ADDRESSES: Send written comments to USDA Forest Service, Idaho Panhandle